IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 27, 2007 Session

KEVIN LEE FULFORD v. TRICIA LYNN FULFORD

Direct Appeal from the Circuit Court for Williamson County
No. 06024 Russ Heldman, Judge

No. M2006-02625-COA-R3-CV - Filed April 22, 2008

This is a divorce case involving several issues, including questions concerning the distribution of the marital debt, the award of alimony, and specific provisions in the parenting plan. We affirm the trial court's division of the marital debt. We modify the alimony award to an award of transitional alimony and hereafter reduce the amount to $2,000 a month for four years. We vacate the portion of the order requiring Father to continue regular counseling. We affirm the order as it pertains to Father's visitation and Mother's decision-making authority. We decline to award Wife her attorney's fees on this appeal.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Modified in Part, Vacated in Part and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Thomas F. Bloom, Nashville, TN, for Appellant

John D. Schwalb, Franklin, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Dr. Kevin Lee Fulford ("Father" or "Appellant") and Tricia Lynn Fulford ("Mother" or "Appellee") were married on January 29, 1999 in California. This was Mother's second marriage, and Father's first. The parties' child, K.R.F., was born December 29, 1999. Mother has another minor child, C.F., from a previous marriage. At the time of the marriage, Father was completing his medical residency.

The parties moved to Greeneville, Tennessee in 2001. Father practiced with a group of OB/GYN's and Mother stayed at home with the children. Mother is a nurse and sought to work part-time on Father's two days off, but Father refused to watch the children on these days off, and thus, Mother did not work.

Father admittedly had "sexual compulsive issues," and Mother demanded that Father undergo therapy. In 2004, Father began therapy with Alexandra Vance, a marriage and family counselor. In May of 2004, Mother filed for divorce; however, the parties attempted reconciliation on condition that Father attend the Center for Professional Excellence, a treatment program at Vanderbilt University. After the successful completion of this program, Father continued seeing Dr. Vance and also attended Sex Addicts Anonymous meetings twice a week. Mother dismissed her divorce petition.

Mother and the children moved to Spring Hill, Tennessee in July of 2005. Father remained in Greeneville, but planned to move to Spring Hill after he found another job. The parties could no longer make the relationship work, and they separated on December 4, 2005. Father still resided in Greeneville.

Father filed for divorce on January 11, 2006, after seven years of marriage. His complaint cited the grounds of irreconcilable differences and Mother's inappropriate marital conduct. Father sought joint custody of K.R.F. and equal residential time.

Mother filed an answer and counter complaint for divorce, citing the grounds of irreconcilable differences, Father's inappropriate marital conduct, and Father's adultery. Mother requested that the court name her as the primary residential parent of K.R.F., and that "visitation between Father and the minor child should be set such that appropriate safe-guards are in place for the minor child."

On March 8, 2006, the trial court entered an order granting Father alternate weekend visitation with K.R.F. The court ordered that Father pay *pendente lite* child support in the amount of $1,440 per month. The court also ordered that Father pay Mother $1,000 a month in rehabilitative alimony beginning February 14, 2006. Father was also responsible for the following payments: the

insurance expenses; the credit card bill; the rental expense for Mother's home; the time-share expenses; and all uncovered medical expenses.

On May 31, 2006, Mother filed a motion for an emergency order seeking to suspend Father's weekly and overnight visitation with K.R.F. Mother alleged as follows:

> 1. [T]hat since the Court's [March 8, 2006 visitation] Order, there has been a substantial and material change of circumstances necessitating an immediate change in [visitation] . . . . That the minor child began exhibiting sexualized behavior and excessive separation anxiety from Mother. That appropriate safeguards should be put in place for the minor child, pending a full and complete hearing . . . .

Mother provided the affidavit of Dr. Louise Strang, a licensed psychologist who currently treats K.R.F. Dr. Strang averred that "[K.R.F.] is exhibiting sexualized behaviors."

The court thereafter appointed a guardian ad litem for K.R.F. Father then filed a motion requesting that the court order K.R.F. to undergo a "forensic interview . . . to determine if [Mother] programmed the child to make the statements set forth in Dr. Strang's affidavit."

Upon Father's motion, the court ordered that several of Mother's interrogatories and his answers be placed under a protective order. Likewise, the court ordered that the expert trial exhibits be placed under a protective order.

The final hearing was held on June 22 and 23 of 2006, and concluded on August 16, 2006. Concerning K.R.F., Mother testified that she had been the primary caregiver. As to the question of Father's visitation, Dr. Joseph LeBarbera performed a forensic interview and was of the opinion that it was unlikely that Father posed a threat to K.R.F., and he saw little basis for reducing his visitation with the child. Ms. Vance also held the position that Father should have unsupervised visitation with the child. K.R.F.'s guardian ad litem, Joy Day, filed her report on August 15, 2006. The report concluded that "it would be in [K.R.F.'s] best interest to have regular, unsupervised visitation with her father." The report reads in relevant part as follows:

> In this case, Dr. Fulford has undergone evaluations by a team of doctors at the Center for Professional Excellence (CPE), and that facility was chosen by Ms. Fulford. The physicians at CPE, led by Dr. Finlayson, have determined that Dr. Fulford's sexual interests are normal. They have further opined that he is not a risk to his daughter [K.R.F.] or any other children.
> . . .

As to the division of marital property, Father and Mother had few marital assets; however, the couple had accumulated a great amount of debt. At the time of trial, both Mother and Father were 36 years old. Father's income was $180,000 as an OB/GYN. Mother is a nurse, and at the time of trial, she obtained a job working as a school nurse with an income of $25,500.

The court entered an order on August 22, 2006, which granted Mother a divorce from Father based on the ground of Father's inappropriate marital conduct. The court ordered that Father "continue regular counseling with [ ] Alexandra Vance. [Father] shall continue regularly attending SAA [Sex Addicts Anonymous] meetings, at a minimum of two (2) times per month, and [Father] must provide notice to [Mother] of the SAA group he attends."

A permanent parenting plan was entered into, naming Mother the primary residential parent. Major decision-making authority was given to Mother regarding K.R.F.'s non-emergency health care. The plan lists Father's visitation as every other weekend beginning Friday at 6:00 p.m. and ending Sunday at 6:00 p.m.

As to the division of the marital debt, the court ordered as follows: "The Court finds that the marital and separate debt shall be equitably divided by [Mother] paying the Discover card debt and the debt to Kevin and Therese Baitx [Mother's parents], and [Father] paying all remaining joint and separate liabilities." The court ordered that Mother pay a total of $68,410 and that Father pay $380,414.

The court awarded Mother rehabilitative alimony for four years in the amount of $4,000 per month: "The Court finds that after considering each party's need and ability to pay, the fault for the demise of this marriage, and all other statutory factors, that [Mother] is the economically disadvantaged spouse and [Father] has the ability to provide support." The court also awarded Mother her attorney's fees in the amount of $28,000. Finally, the court ordered that Father pay the guardian ad litem's fee of $9,219.

Father filed a motion to alter and amend the judgment on September 5, 2006. The court denied the motion on October 30, 2006. This appeal timely followed.

II. ISSUES PRESENTED

Appellant presents several issues for our review, which we slightly reword:

1. Whether the trial court abused its discretion in its division of the marital debt.

2. Whether the trial court abused its discretion in awarding Wife rehabilitative alimony and her attorney's fees.

3. Whether the trial court abused its discretion in failing to order joint decision-making authority concerning the minor child's medical treatment.

4. Whether the trial court abused its discretion by requiring Husband to continue attending regular counseling.

5. Whether the parenting plan incorrectly states the ending time for Husband's weekend visitation with the minor child.

As discussed below, we affirm in part and reverse in part.

III. STANDARD OF REVIEW

We review the trial court's conclusions of law *de novo* with no presumption of correctness. ***Broadbent v. Broadbent***, 211 S.W.3d 216, 220 (Tenn. 2006) (citing *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997)). Alternatively, we review the trial court's findings of fact de novo with a presumption of correctness. Tenn. R. App. P. 13(d)(2007); ***Broadbent***, 211 S.W.3d at 220 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744 (Tenn. 2002)).

IV. DISCUSSION

A. Division of Marital Debt

Father argues that the trial court abused its discretion in not accepting his proposal of the division of the marital debt. Specifically, Father contends that Mother should be responsible for the credit card debt she incurred after the separation.[1]

"Marital property" is defined by statute as follows: "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce[.]" Tenn. Code Ann. § 36-4-121(b)(1)(A). Similarly, our Supreme Court has defined marital debts as "all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." ***Alford v. Alford***, 120 S.W.3d 810, 813 (Tenn. 2003). The trial court should equitably divide marital debts in the same manner as marital property. ***Id.*** (citations omitted). On appeal, "[i]t is not the role of this Court to tweak a trial court's distribution of property. Rather, we must look to determine if the overall property distribution is equitable." ***Morton v. Morton***, 182 S.W.3d 821, 834 (Tenn.Ct. App. 2005) (citation omitted). Thus, we will likewise not tweak the distribution of debt, but instead, look to the overall debt distribution to determine if it is equitable. "[T]he trial court has broad discretion and should do equity in allocating debt as one part of the overall distribution of marital property." ***Alford***, 120 S.W.3d at 814.

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[1] Father also argues that "the trial court initially intended to make the Father responsible for all marital debt incurred prior to the parties' separation . . . . However, in the confusion of the moment, the Mother's attorney was able to alter this apparent intention." We must look to the final order, and not Father's assertion of what the trial court "initially" intended. *See* ***Sparkle Laundry & Cleaners v. Kelton***, 595 S.W.2d 88, 93 (Tenn. Ct. App. 1979) (citations omitted).

In the present case, the division of the marital debt is at issue, as the parties had little marital property to divide, and that division is not in dispute. We are governed by the following four factors in determining how marital debt should be allocated: 1) the purpose of the debt; 2) which party incurred the debt; 3) which party benefitted from the debt; and 4) which party is better positioned to pay the debt. ***Alford***, 120 S.W.3d at 814 (citing *Mondelli v. Howard*, 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989)). Again, it is not our job to tweak the trial court's division of the marital debt, and looking to the overall distribution, we find that the trial court did not abuse its discretion. First, Mother testified that she incurred this post-separation debt after she moved to Spring Hill to help supplement her and K.R.F.'s living expenses, and also used some of the monies to help become self-sufficient by starting two businesses (although both these business ventures ultimately failed). Although Father points out that he was giving Mother around $2,100 a month during the separation, Mother testified that Father refused to give any financial support during "several months," and that the $2,100 was "not enough money to live on, so I was supplementing." Mother is clearly the party that incurred the credit card debt that Father complains of. We disagree with Father's assertion that "neither party stands in a better position to pay the debts." Father's income-earning potential is at least $180,000 compared to Mother's income of $25,500.[2] Also taking into consideration the fact that the couple had little in the way of marital property, "the courts are now generally inclined to award economically disadvantaged spouses a small portion of the marital debt in cases where there are few marital assets." ***Norman v. Norman***, No. M2004-00738-COA-R3-CV, 2005 WL 2860274, at *11 (Tenn. Ct. App. Oct. 31, 2005). Father also argues several times that these debts were incurred by Mother after the separation, but as already stated, marital debt includes debt up to the date of the divorce. In conclusion, we find that the trial court did not abuse its discretion in the division of the marital debt, nor looking to the totality of the circumstances do we find the division inequitable.

B. Alimony and Attorney's Fees

Father next argues that the trial court abused its discretion by awarding Mother rehabilitative alimony in the amount of $4,000 a month for four years. After our review of the record, we do not believe that an award of rehabilitative alimony was appropriate in this case. We agree with Father that the record is devoid of evidence relating to Mother's plan of rehabilitation. We disagree, however, with Father's contention that Mother is not entitled to an alimony award.

Trial courts have wide discretion in awarding alimony. ***Robertson v. Robertson***, 76 S.W.3d 337, 342 (Tenn. 2002). Thus, we "are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to the public policies

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[2] The Middle Section of this Court granted Mother's motion to consider post-judgment facts relating to both Mother and Father's bankruptcy proceedings. Even considering the post-judgment bankruptcy proceedings of both Father and Mother, this would not change the outcome of this decision. Both parties were able to discharge nearly all of their debt. Father's argument that Mother was able to file Under Chapter 7, thereby discharging more of her debt than compared to Father, who could only file under Chapter 13, appears to this court irrelevant. And even considering such an argument, we agree with Mother that Father's obligation is now significantly less than he proposed to the trial court.

reflected in the applicable statutes." ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001) (quotation omitted).

We believe that an award of transitional alimony is more appropriate in this case, as an award of rehabilitative alimony is not supported by the evidence. "Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce[.]" Tenn. Code Ann. § 36-5-121(3)(g)(1). Here, we find no indication that Mother needs rehabilitation; rather, this is a case where transitional alimony is needed to ease Mother's transition to self-sufficiency, or in other words, to get Mother from "point A to point B." *See* ***Price v. Price***, No. M2005-02704-COA-R3-CV, 2007 WL 1555828, at *8 (Tenn. Ct. App. May 29, 2007). Mother's earning capacity is much lower than Father's.[3] As discussed above, neither party had any separate assets to speak of, nor were there substantial marital assets to divide. Although the court acknowledged that it was a close call, the court ultimately found Father at fault and granted the divorce to Mother. Thus, we disagree with Father than an award of alimony is inappropriate; however, as to the amount of the award, we reduce the amount hereafter to $2,000 a month in transitional alimony for four years, taking into consideration Father's bankruptcy and his ability to pay.

As for the award of Mother's attorney's fees at the trial court level, Father simply argues that he is "unable to pay the alimony and attorney[']s fees in light of his debts . . . ." The trial court's decision to award attorney's fees will not be overturned absent a clear abuse of discretion, ***Chaffin v. Ellis***, 211 S.W.3d 264, 290 (Tenn. Ct. App. 2006) (citing ***Aaron v. Aaron***, 909 S.W.2d 408, 411 (Tenn.1995)), and we find no such abuse. "An award of attorney's fees is proper when one spouse is disadvantaged and does not have sufficient resources with which to pay those fees." ***Sullivan v. Sullivan***, 107 S.W.3d 507, 513 (Tenn. Ct. App. 2002) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). In light of the fact that there was little in the way of marital assets, and taking into consideration Mother's need, the trial court did not abuse its discretion in awarding some of Mother's attorney's fees.[4] As to Mother's request for attorney's fees on this appeal, however, we decline such an award.

C. Parenting Plan: Medical Decision-Making Authority

We next turn to the issue of whether the trial court abused its discretion by awarding Mother full medical decision-making authority for K.R.F. Father cites to no cases to support his argument;

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[3] Father argues that Mother is underemployed, but Father failed to raise this argument at the trial court level, and thus, we need not address that issue.

[4] The court ordered that Father pay Wife's attorney's fees of $28,000. The total amount of Mother's attorney's fees was $41,342. Mother does not appeal this order.

rather, he argues that Mother only pointed to one instance at trial where he made a mistake in regard to K.R.F.'s treatment, and that this is not enough to deprive him "of the right to be heard in the medical treatment of his child." Mother disagrees, pointing to several instances in the record where Father showed resistance to obtaining medical treatment.

A permanent parenting plan must "[a]llocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing." Tenn. Code Ann. § 36-6-404(a)(5). Trial courts have great discretion in the details of visitation arrangements. ***Hogue v. Hogue***, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004). After a review of the record, we find that the trial court did not abuse its discretion when it awarded Mother full decision-making authority regarding K.R.F.'s non-emergency health care.

Mother testified that on several occasions Father showed resistance to traditional medical treatment. Mother testified that in 2004, K.R.F. was sick and she wished to take the child to the doctor, but that Father examined her and determined that she was "fine" and did not need to see a doctor. Thereafter, K.R.F.'s condition became worse, with a 104 degree fever, and Mother eventually took her to the pediatrician, against Father's wishes. The pediatrician ordered that she immediately take the child to the hospital because the child had pneumonia, bilateral ear infections, and severe pharyngitis. Mother also spoke of a time when she became ill after taking some medication, and that she asked Father to read the warning on the prescription, because she thought she might be experiencing some type of reaction. She described her symptoms to Father, and he told her that they were not listed as any of the prescriptions's side effects. Mother testified that she was in terrible pain, but that she "rode it out." Later, when she felt better, she looked on the prescription insert and saw the warnings, which directed that anyone with her symptoms should go to the emergency room. Mother also testified that Father used alternative treatments for his testicular cancer and that he had refused conventional medical treatment until his third recurrence of cancer. Mother stated that she was concerned that Father would not take the child to the doctor and that if the child became ill with something like cancer or some other serious illness, Father would not "let her have traditional treatment."

Given the testimony, which Father did not refute, we find that the trial court did not abuse its discretion in awarding Mother full decision-making authority concerning K.R.F's medical care. Father also argues that he is "a medical doctor who possesses superior training and experience than the Mother in health care[,]" but we point out that Mother is a nurse. We affirm the trial court's determination of this issue.

D. Counseling

We next examine whether the trial court erred in ordering Father to "continue regular counseling with [ ] Alexandra Vance." As to the sexual issues surrounding Father, Ms. Vance testified that she saw Father once a week and that in the future, she believed that he would need "very little outpatient treatment[.]" Thus, we find that the court erred in ordering Father to continue "regular counseling" of an unspecified duration with Ms. Vance.

E. Parenting Plan: Visitation

Father argues that Judge Heldman ruled from the bench that his weekend visitation would end at 8 p.m. on Sunday, but that Mother's parenting plan, which the court adopted, lists the ending time at 6 p.m. From Judge Heldman's comments at the conclusion of the trial, it does appear that he stated that the ending time would be 8 p.m.; however, the parenting plan which Judge Heldman signed clearly lists the ending time of 6 p.m. "A court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered." ***Sparkle Laundry & Cleaners v. Kelton***, 595 S.W.2d 88, 93 (Tenn. Ct. App. 1979) (citations omitted). In any event, Father did not raise the visitation issue in his motion to alter or amend the judgment. "We are not required to grant relief 'to a party . . . who failed to take whatever action was reasonably available to . . . nullify the harmful effect of an error.'" ***Irion v. Goss***, No. E2006-02421-COA-R3-CV, 2007 WL 2198569, at *3 (Tenn. Ct. App. July 31, 2007) (quoting Tenn. R. App. P. 36(a)).

V. CONCLUSION

For the aforementioned reasons, we vacate the decision of the trial court as it pertains to Father's counseling. We modify the award of alimony to an award of transitional alimony, hereafter in the amount of $2,000 a month for four years. We affirm in all other respects. The case is remanded to the trial court for an entry of a judgment consistent with this opinion. Costs of this appeal are assessed against Appellant, Kevin Lee Fulford, and his surety for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.